

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 22 June 2004**

**BALCA Case Nos.: 2003-INA-181 through 2003-INA-195<sup>1</sup>**  
ETA Case Nos.: P2000-AZ-09480560 through P2000-AZ-09480573

*In the Matters of:*

**LIANN'S HOMES,**  
*Employer,*

*on behalf of*

**REYNALDO ROMANO MARTINEZ, OLGA SKAVYSH ZORKINA,  
MAKSYM BONDARYEV, WILFREDO JIMENO MONTANO, HANS  
ERIC TAN, MARY ROSE MARASIGAN, GLADDINE ABREA,  
ALLAN CAGAPI VILLANUEVA, BERNANDITA MORENO,  
ELAINE ANTONETTE ALVARADO, MARIA LOURDES  
LANDICHO, CESAR AVELLANA, GERARDO BAUTISTA, MARIA  
CRISTINA MANALOTO,**  
*Aliens.*

Certifying Officer: Martin Rios  
San Francisco, California

Appearances: Marshall G. Whitehead, Esquire  
Phoenix, Arizona  
For the Employer and the Alien

Before: Burke, Chapman and Vittone  
Administrative Law Judges

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<sup>1</sup> Due to a clerical error, the appeal in Reynaldo Romano Martinez, ETA No. P2000-AZ-09480560, was docketed in as both case number 2003-INA-181 and 2003-INA-182. Therefore, case number 2003-INA-181 has been administratively closed.

## **DECISION AND ORDER**

**PER CURIAM.** This case arises from fourteen applications for labor certification<sup>2</sup> filed by Lina Alba d/b/a Liann's Homes ("the Employer") on behalf of fourteen aliens for the position of manager. The following decision is based on the record upon which the Certifying Officer ("CO") denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c). Because the same or substantially similar evidence is relevant and material to each of these appeals, we have consolidated these matters for decision. *See* 29 C.F.R. § 18.11.<sup>3</sup>

## **STATEMENT OF THE CASE**

On May 16, 2000, the Employer filed an application for alien employment certification on behalf of the Alien, Olga Skavysh Zorkina, to fill the position of manager of a health care facility. The job duties included supervising caregivers, overseeing residents' daily activities, maintaining records, and performing caregiving duties when required. (AF 40). A high school degree, as well as two years of experience was required. The Employer operates seven assisted living facilities for the elderly in Scottsdale and Tempe, Arizona. These facilities are residential care homes and each facility is licensed to hold between five and ten beds. The positions for which labor certification is sought are manager positions; the Employer has also employed caregivers at each facility.

The CO issued a Notice of Findings ("NOF") on March 16, 2001, indicating his intent to deny the applications for certification. (AF 32-39). The CO determined that there was a question of whether the position was a bona fide job opportunity and that

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<sup>2</sup> Alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

<sup>3</sup> In this decision, "the Alien" refers specifically to Olga Skavysh Zorkina and references to the Appeal File ("AF") refer to Zorkina's Appeal File as representative of all the appeals. A virtually identical application was filed for all fourteen aliens and the issues raised and dealt with by the CO in each case are identical.

there was an undisclosed requirement that the worker live-in, or reside at the facility. The CO was uncertain as to the classification of the position; if the position described was a caregiver position, it would be considered Nurse, Practical, and not a skilled position. The Employer classified the position as a manager, stating that the worker only performed caregiving functions as “back-up.” The CO questioned whether the Employer could pay the aliens’ salaries and requested documentation regarding the Employer’s income, as well as daily operations of the facilities. (AF 34-36).

The Employer submitted its Rebuttal by letter dated April 16, 2001. (AF 17-31). The Employer included the addresses of each facility, information about the Directors of Operations of Liann’s Homes, a description of the duties of managers and caregivers, and compliance information for state regulations dealing with assisted living facilities. (AF 17-23). The Employer also submitted voluminous attachments,<sup>4</sup> including tax records, employee schedules, and daily activities listings for the residents of the homes. (Martinez AF 103-566).

The CO issued a Final Determination (“FD”) denying certification on October 4, 2002. (AF 12-16). The CO determined that the Employer failed to satisfactorily rebut the findings in the NOF with respect to the bona fide job opportunity, the adverse effect of the undisclosed live-in requirement and the double shifts, and the unlawful terms and conditions of the employment, specifically a failure to pay wages to employees. (AF 15). The CO questioned the Employer’s practice of allowing workers to decide whether they would be considered ‘employees’ and receive a W-2 income reporting form or ‘non-employees’ and receive a Form 1099 income reporting form. (AF 37-38). The CO found that there was no legal basis for considering workers non-employees based either on their preference for not withholding taxes from their paychecks or their status as a part-time worker.

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<sup>4</sup> The appeal files of the fourteen aliens contain only one copy of the rebuttal attachments, numbered as AF pages 13-566 in Reynaldo Romano Martinez’s (BALCA Case No. 2003-INA-182) appeal file. References to these attachments are as follows: Martinez AF \_\_\_\_.

On October 25, 2002, the Employer submitted a request for review and the matter was docketed in this office on May 20, 2003. (AF 1). The Employer filed a brief on June 23, 2003.

## **DISCUSSION**

The employer has the burden of proof to show that a bona fide job opportunity exists and is open to U.S. workers. *Amger Corp.*, 1987-INA-545 (Oct. 15, 1987) (*en banc*). The employer must establish the bona fide nature of the *position*, not the business. *Atherton Development and Engineering Corp.*, 1992-INA-422 (May 11, 1994) (*emphasis added*) (holding that the employer's showing that it is a bona fide corporation or business does not establish that the position offered is a bona fide job opportunity). To make this showing, the employer must present reasonably requested documents to establish that a current job opportunity exists and that the employer has sufficient funds to pay the worker's salary. *Aerial Topographic Maps*, 1994-INA-627 (Aug. 15, 1996).

In the NOF, the CO requested documentation as to the duties of a manager versus those of a caregiver. (AF 34-36). The CO questioned whether the duties of caregiver had been inflated to create a management position. (AF 33). The CO also requested documentation to verify that the facilities had sufficient income to support and employ six full-time workers (three managers and three caregivers) at each facility. (AF 36). In rebuttal, the Employer provided the CO with a plethora of records, including information regarding the number of patients residing at each facility and the costs paid by each patient. The Employer argued that current managers were forced to perform caregiver duties because the Employer could not recruit enough workers to comply with state regulations. (AF 21-22). The majority of the facilities the Employer managed were not at full capacity, as the Employer claimed difficulties staffing the facilities. (AF 22).

The CO determined that the position was managerial in nature given the increased job duties of supervising the caregivers and managing the facility. (AF 15-16). The documentation submitted by the Employer verified the bona fide nature of the job and the

classification of the position as a skilled worker. Although the Employer had demonstrated that there was a bona fide job opportunity for a managerial position, the CO found that the Employer had failed to show that the job was truly open to U.S. workers. (AF 16).

Twenty C.F.R. § 656.20(c)(8) requires that the job for which certification is sought be clearly open to any qualified U.S. worker. The CO requested documentation to establish that the position was clearly open to U.S. workers. The Employer failed to submit any such documentation, but instead relied on an earlier assertion that an application for a similar position with a different employer had been approved. The Employer submitted a copy of an approval for a nurse assistant at a home in California, (AF 44), and referenced an application approved in 1997 for the same position in the Employer's company. (AF 18). The Board is not bound by the finding of a CO in a similar case. *Tedmar's Oak Factory*, 1989-INA-62 (Feb. 26, 1990). Approval of a similar application does not establish that the position for which the Employer seeks certification is clearly open to any qualified U.S. worker.

With the request for review, the Employer submitted a newspaper article discussing the nursing shortage in Arizona.<sup>5</sup> The Employer attempted to use this documentation to bolster the argument that the job was clearly open to U.S. workers. Evidence presented for the first time with the request for review will not be considered. *See Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992); *Kelper International Corp.*, 1990-INA-191 (May 20, 1991). Even so, the shortage of qualified workers in an occupational field does not establish a bona fide job opportunity in this case. *See, e.g., Our Lady of Guadalupe School*, 1988-INA-313 (June 2, 1989) (holding that a bona fide job opportunity for an elementary school teacher does not exist merely because there is a teacher shortage and the employer is an elementary school). Accordingly, the Employer

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<sup>5</sup> The article "Nursing Shortage Deadly" was published in The Arizona Republic on October 23, 2002 and discussed nursing shortages at national and local hospitals. (AF 8-10).

has failed to establish that the job opportunity was clearly open to U.S. workers and certification was properly denied.<sup>6</sup>

## **ORDER**

The Certifying Officer's denials of labor certification are hereby **AFFIRMED**.

Entered at the direction of the panel by:

**A**

Todd R. Smyth  
Secretary to the Board of  
Alien Labor Certification Appeals

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W., Suite 400  
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.

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<sup>6</sup> Because certification was properly denied on these grounds, it is unnecessary for the Board to address the CO's findings regarding the unlawful terms and conditions of employment and the undisclosed requirement to live-in the facility.